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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 246

ALBERT B. MUIR, III.,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.

## RESPONSE TO
## PETITION FOR WRIT OF CERTIORARI

EARL FAIRCLOTH
*Attorney General*

NELSON E. BAILEY
*Assistant Attorney General*

Capitol Building
Tallahassee, Florida

COUNSEL FOR RESPONDENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 246

ALBERT B. MUIR, III.,
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-vs-
STATE OF FLORIDA,
Respondent.

## RESPONSE TO
## PETITION FOR WRIT OF CERTIORARI

### OPINIONS BELOW

The judgment of conviction and commitment order of the Circuit Court of Duval County, Florida, printed in Petitioner's Appendix A, at page A1, is not officially reported. The opinion and judgment of the District Court of Appeal of Florida, First District, printed in Petitioner's Appendix A, at pages A3-A13, is reported in 232 So.2d 225.

### JURISDICTION

The judgment of the District Court of Appeal of Florida, First District, was entered on February 24, 1970, and a timely petition for rehearing was denied on March 19, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) because a claim of constitutionally protected rights is involved, and respondent takes a partial exception thereto as pointed out, infra, in respondent's Reasons for Declining to Grant the Writ of Certiorari Prayed for By petitioner, Point I.

## QUESTIONS PRESENTED

Respondent accepts petitioner's statement of the Questions Presented, except as argued to the contrary in respondent's Reasons for Declining to Grant the Writ of Certiorari Prayed for By Petitioner, infra, Point I.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the Constitutional Provisions involved, except as argued to the contrary in respondent's Reasons For Declining to Grant the Writ of Certiorari Prayed for By Petitioner, infra, Point 1.

## STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

## REASONS FOR DECLINING TO GRANT THE WRIT OF CERTIORARI PRAYED FOR BY PETITIONER

### POINT I

DID THE COURT BELOW DECIDE A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DECIDED BY THIS COURT, i.e., THAT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION IS NOT APPLICABLE TO

A DIRECT CRIMINAL CONTEMPT PROCEEDING; AND THAT AN ACCUSED IN SUCH A PROCEEDING NEED NOT BE INFORMED FIRST OF HIS RIGHT TO REMAIN SILENT BEFORE BEING QUESTIONED BY THE JUDGE UPON WHOSE COURT THE ALLEGED DIRECT CRIMINAL CONTEMPT WAS COMMITTED?

POINT II

DID THE STATE COURT BELOW DECIDE A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT, i.e., THAT THE SIXTH AMENDMENT RIGHT TO JURY TRIAL DOES NOT APPLY TO STATE COURT PROSECUTIONS FOR DIRECT CRIMINAL CONTEMPT?

ARGUMENT

POINT I

DID THE COURT BELOW DECIDE A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DECIDED BY THIS COURT, i.e., THAT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION IS NOT APPLICABLE TO A DIRECT CRIMINAL CONTEMPT PROCEEDING, AND THAT AN ACCUSED IN SUCH A PROCEEDING NEED NOT BE INFORMED FIRST OF HIS RIGHT TO REMAIN SILENT BEFORE BEING QUESTIONED BY THE JUDGE UPON WHOSE COURT THE ALLEGED DIRECT CRIMINAL CONTEMPT WAS COMMITTED?

The petitioner asserts, inter alia, that the court below has decided a federal question of substance not heretofore decided by this Court, i.e., that the Fifth Amendment privilege against self incrimination is not applicable to a direct criminal contempt proceeding, and that an accused in such a proceeding need not be informed first of his right to remain silent before being questioned by the judge upon whose court the alleged direct criminal contempt was committed.

A careful study of the lower court's opinion fails to disclose that such a question was under advisement, or that in reaching its conclusion, the question either directly or indirectly was being determined by the court (petitioner's Appendix B). Further, and more significantly, an examination of both petitioner's appellate brief and petitioner's appellate reply brief fails to reveal that petitioner was presenting such a question to the court (Appendix 1 and 2, infra). The only reference whatsoever made by the petitioner in either brief as to the existence of a question is found in the argument section, under Point On Appeal Number Three, wherein the petitioner contends that he was denied effective assistance of counsel and utilizes the issue now presented to this Court only as an example of the alleged constitutional insufficiency. Such an obscure and indirect reference to this issue now being presented to the Supreme Court can hardly be said to have adequately and properly presented the issue to the state court below. This Court has determined that the Supreme Court will review a decision of a state court only where it affirmatively appears from the record that a federal question was presented to the highest state court having jurisdiction and that its decision upon the federal question was necessary to the determination of the cause. *Durley v. Mayo*, (Fla. 1956), 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct. 806, reh.den., 352 U.S. 859, 1 L.Ed.2d 69, 77 S.Ct. 22. See also *Southwestern Bell Telephone Co. v. State of Oklahoma*, (Okl. 1938), 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528.

Respondent firmly maintains its position that this issue

properly cannot be raised now. However, respondent will assume, for purposes of argument only, that the question was presented to the state court below and was passed upon judicially by the court in rendering its opinion.

The petitioner maintains, basically, under this point, that the *Miranda* rule should be expressly extended to direct criminal contempt cases such as the one now under consideration. Respondent suggests that the *Miranda* rule was never intended to apply to the particular facts and circumstances present in the instant case, nor could such rule properly be applied to direct criminal contempt hearings as were conducted by the court below in order to determine the petitioner's guilt or innocence. In examining *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, it is readily apparent what the court was trying to alleviate by its decision. On the opening page of Mr. Chief Justice Warren's majority opinion, this Court said:

> "... More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."

At a later point in its decision, the Court defined what it meant by the term "custodial interrogation".

> "... By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way...."

Permeating the entire opinion is the court's predominant concern with the oppressive and intimidating atmosphere which is inherent in a police-dominated interrogation. It is this natural element of compulsion which lead the court to insist that the most stringent safeguards be observed by the

interrogating officers prior to any questioning of the criminal suspect in a "custodial interrogation".

An additional consideration is the fact that *Miranda* contemplated the propriety of admitting into evidence against the defendant *at a subsequent judicial proceeding* those incriminating statements which were the products of the custodial interrogation previously held. At a criminal contempt proceeding any so-called interrogation takes place during the trial itself. There are no further proceedings from which such statements could be excluded; thus, how can the exclusionary rule of the *Miranda* decision be applicable in such a case?

No substantial federal question is raised by petitioner's reference to the *Miranda* ruling in the context of the present petition for writ of certiorari.

Respondent further suggests that the factual situation in the instant case does not raise the issue petitioner now attempts to bring before this Court. Petitioner, *at all times and at all hearings before the judge*, was represented by privately retained counsel who had as his very purpose for being present the responsibility of seeing that his client's rights were protected—including the right to remain silent under the Fifth Amendment. It was the province of this attorney to advise his client of his most basic and fundamental rights and to see that those rights were properly exercised, not that of the judge's.

## POINT II

DID THE STATE COURT BELOW DECIDE A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT, i.e., THAT THE SIXTH AMENDMENT RIGHT TO JURY TRIAL DOES NOT APPLY TO STATE COURT PROSECUTIONS FOR DIRECT CRIMINAL CONTEMPT?

The petitioner contends that the state court below decided a federal question of substance in a way probably in conflict with decisions of this Court, i.e., that the Sixth Amendment right to jury trial does not apply to state court prosecutions for direct criminal contempt. *Bloom v. Illinois*, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477, provides the basis for petitioner's argument of this point in his petition for writ of certiorari.

In the *Bloom* decision, this Court re-examined the long-standing rule that a criminal contempt could be tried constitutionally without a jury. The court determined that *serious* criminal contempts are so nearly like other serious crimes that they are subject to the Constitution's jury trial provisions.

Florida law provides no maximum punishment for a conviction of direct criminal contempt. The question is: Does the instant petition for writ of certiorari involve a serious criminal contempt as contemplated by the *Bloom* decision? This question is answered by reference to the Supreme Court's subsequent opinion in *Frank v. United States*, 395 U.S. 147, 23 L.Ed.2d 162, 89 S.Ct. 1503, which specifically defined the "serious criminal contempt" spoken of in *Bloom*. In *Frank v. United States*, supra, the Supreme Court ruled that criminal contempt sentences of up to six months may be imposed without a jury trial where no maximum penalty is set by law for such offenses. This Court held that in such cases, the actual sentence imposed is the best indication of the seriousness of the particular offense, and that the defendant is entitled to a jury trial *unless* the particular offense can be classified as "petty". This Court determined that the classification of an offense as "petty" meant that no more than a six month sentence was imposed for such offense or that a fine of no more than $500.00 was ordered, or both. In the instant case, not only did the petitioner receive *only a 60 day sentence* (petitioner's Appendix A, at page A1), but on appeal, the sentence was reversed and the petitioner ordered discharged by the reviewing court below (petitioner's Appendix B, at page A12).

Since the petitioner obtained a supersedeas bond the day following the order of January 10, 1969, (petitioner's Appendix B, at page A8), and bond was continued in effect up until this order and sentence were reviewed by the state appellate court below, the petitioner *actually served only a one day sentence.* Respondent, therefore, respectfully submits that the petitioner was not entitled to have a jury trial for this direct criminal contempt on the authority of *Frank v. United States*, supra, and that this point is insufficient to serve as the basis for the issuance of the instant writ.

## CONCLUSION

For the foregoing reasons, respondent submits that petitioner's petition for writ of certiorari should be denied and the writ discharged.

Respectfully submitted,

EARL FAIRCLOTH
*Attorney General*

NELSON E. BAILEY
*Assistant Attorney General*

Capitol Building
Tallahassee, Florida

COUNSEL FOR RESPONDENT

## PROOF OF SERVICE

This is to certify that a copy of the foregoing Response to Petition for Writ of Certiorari has been furnished petitioner's counsel, the Honorable Joseph M. Glickstein, Jr., 1205 Universal Marion Building, Jacksonville, Florida, 32202, by Mail, this _____ day of November, 1970.

---

NELSON E. BAILEY
*Assistant Attorney General*

Capitol Building
Tallahassee, Florida

OF COUNSEL FOR RESPONDENT

APPENDIX 1

IN THE

DISTRICT COURT OF APPEAL OF FLORIDA

FIRST DISTRICT

| | | |
|---|---|---|
| ALBERT B. MUIR, III, | ) | |
| | : | |
| Appellant, | ) | |
| | : | |
| vs. | ) | NO. L-365 |
| | : | |
| MARY CAROL MUIR, | ) | |
| | : | |
| Appellee. | ) | |
| | : | |

APPEAL FROM THE

CIRCUIT COURT OF DUVAL COUNTY

# BRIEF FOR APPELLANT

Joseph M. Glickstein, Jr.
*Attorney for Appellant*

Glickstein, Grenshaw, Glickstein, Hulsey & Fay
1205 Universal Marion Building
Jacksonville, Florida 32202

Of Counsel.

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Points Involved:

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2. The judge failed to comply with Part XVI, Florida Rules of Criminal Procedure. (Raised by Assignments of Error Nos. 5 and 7) . . . . . 12

3. The post judgment proceedings, conviction and the order of commitment of sixty days in the Duval County Jail for direct contempt contravene plaintiff's constitutional rights under the Fifth, Sixth and §1 of the Fourteenth Amendments to the Constitution of the United States, and §§2, 9 and 16, Declaration of Rights, §3 of Article II, and §3 of Article V, Constitution of Florida of 1968. (Raised by Assignments of Error Nos. 1, 2, 3, 4, 5, 6 and 7) . . . . . 14

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IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

| | | |
|---|---|---|
| ALBERT B. MUIR, III, | ) | |
| | : | |
| Appellant, | ) | |
| | : | |
| vs. | ) | NO. L-365 |
| | : | |
| MARY CAROL MUIR, | ) | |
| | : | |
| Appellee. | ) | |
| | : | |

## BRIEF OF APPELLANT*

### Statement of the Case

This is an appeal, pursuant to Part VI, Florida Appellate Rules, by the plaintiff below, from a post judgment order (R 124) of the Circuit Court of Duval County, imprisoning plaintiff for sixty (60) days for direct contempt.

### Statement of the Facts

Plaintiff filed his complaint for divorce on May 13, 1968, alleging as grounds therefor statutory desertion (A 1). His affidavit for constructive service, sworn to May 10, 1968, was filed May 13, 1968 (A 1, 2). Based on the affidavit, publication of notice of suit was made in Duval County on May 14, 21, 28 and June 4, 1968. Plaintiff's attorney then filed his certificate of service and a motion for default (A 2, 3),

* In this brief, the parties will be referred to as they were in the trial court and the symbols "R" will be used for Record-on-Appeal; and, "A" for the Appendix.

together with his affidavit of non-military service, in which he also stated that defendant's whereabouts were unknown (A 3).

Plaintiff's affidavit for constructive service contained the required recitation that diligent search and inquiry had been made and added, parenthetically, that "the details of which will be testified to at the final hearing" and concluded with the statement that defendant's residence was unknown to the plaintiff (A 2). Final hearing occurred on September 18, 1968 (R 2-13), and final judgment of divorce was dated, entered and filed September 19, 1968 (R 1). At the final hearing the following examination was conducted by the trial court:

"THE COURT: What did you do to try and locate her?

"THE WITNESS: I asked around.

"THE COURT: Where?

"THE WITNESS: Here in Florida.

"THE COURT: Her family lives in New Jersey, you were married in New Jersey, did you contact her mother?

"THE WITNESS: Several times.

"THE COURT: Did you hear from her?

"THE WITNESS: Yes, sir.

"THE COURT: Was she there?

"THE WITNESS: No, sir.

"THE COURT: Did the mother say whether she knew or didn't know where she was?

"THE WITNESS: We didn't get along very well.

"THE COURT: She did answer your letters.

"THE WITNESS: Yes, sir.

"THE COURT: Have you ever placed a person to person call for her at her mother's home?

"THE WITNESS: No. sir.

"THE COURT: Did her mother tell you where she was?

"THE WITNESS: She didn't give me any indication she was there.

"THE COURT: Did she tell you she wasn't there?
"THE WITNESS: No sir, she just didn't tell me anything.
"THE COURT: Where else did you look for her?
"THE WITNESS: I have asked around friends I thought possibly some of her friends could have known where she was. There was a Mrs. Craig and several others. They were in the Navy also. They are friends of hers but they are gone from here now.
"THE COURT: Have you been making an allotment to her?
"THE WITNESS: No, sir.
"THE COURT: The Navy hasn't been paying any allotment to her?
"THE WITNESS: I have been getting a BAQ basic allowance for quarters and she hasn't been getting an allowance, no, sir.
"THE COURT: What grade are you?
"THE WITNESS: AG1, E6.
"THE COURT: Why did she leave in April?
"THE WITNESS: Why? I don't know. Sometimes she would do it for a couple of days and the next time it would be a week and then months. The last time I took her back after she had been gone for a period of 14 months. I loved her and wanted to make a go of it. She was in New Jersey.
"THE COURT: With her mother?
"THE WITNESS: No, sir, in Margate in a motel. They were not at her mother's.
"THE COURT: They were not at her mother's?
"THE WITNESS: No, sir.
"THE COURT: Where were they?
"THE WITNESS: She wouldn't let me go get them.
"THE COURT: Did she go?
"THE WITNESS: Yes, sir.
"THE COURT: Did she have the child with her then?

"THE WITNESS: No, sir, it was before he was born.

"THE COURT: How old is she?

"THE WITNESS: Thirty-one.

"THE COURT: How old are you?

"THE WITNESS: Thirty-one.

"THE COURT: You don't know anywhere you could go to find her?

"THE WITNESS: No, sir, I don't.

"THE COURT: Call your next witness." (R 7-10)

The final judgment of divorce contained a specific finding by the trial court that it had jurisdiction of the subject matter and of the parties (R 1). The court further found that the equities were with the plaintiff and granted plaintiff a divorce from the defendant and dissolved the bonds of matrimony.

On November 27, 1968, the trial court entered its "Order for Citation" (R 14-15) and directed that plaintiff and his attorney of record, James Culpepper, be cited to appear before the court, and directed the Clerk to issue a citation for plaintiff's appearance on Wednesday, December 4, 1968. The order further directed plaintiff and his attorney to show cause why plaintiff should not be adjudged in contempt for false statement. Pursuant to said order the Deputy Clerk issued the citation (R 32-33), which also advised plaintiff that "[t]he court file contains the evidence upon which the above charges are based, which may be inspected at any time." (R 32)

In its Citation (R 32), the court stated:

"You are hereby notified that, based on information presented to Judge Lamar Winegeart, Jr., Circuit Judge of the Circuit Court in and for Duval County, Florida, that you the said Albert B. Muir, III, have apparently filed a sworn affidavit containing false allegations and have given sworn false testimony in obtaining your final judgment of divorce from Mary Carol Muir, which said final judgement was entered herein on the 19th day of September 1968."

In response to the Citation, plaintiff appeared and, on December 4, 1968, prior to the interrogation, the following occurred:

"THE COURT: Mr. Culpepper, have you informed your client of the State of Florida regarding perjury?

"MR. CULPEPPER: Yes, sir.

"THE COURT: Have you informed him this is a crime punishable by twenty years in Florida's State Prison, Raiford?

"MR. CULPEPPER: Yes, sir, we're aware of that."

(R 37)

"THE COURT: Mr. Muir, I want to tell you this: I'm trying to be patient.

"A. Yes, sir.

"THE COURT: Looking back on this transcript and all, it looks like you were playing a little cute with the Court and like you are trying this morning.

"This County Jail is full of people that tried that."

(R 41-42)

"THE COURT: We're not going on who has grounds for divorce now. Only whether or not he sustained grounds for desertion and whether or not he lied to this Court. At least he played cute with it from the evidence."

(R 54)

"THE COURT: Here's what I'm going to do. I'm going to continue this hearing until in January. I'm going to order you to deposit it in Domestic Relations in this Court to be forwarded to your ex-wife in Atlantic City, New Jersey to pay her for coming down here for further hearing in this matter. And you are looking twenty years in prison in the face and you had better not forget it. That is for perjury if the Court sets aside the final decree and you got a little thing of bigamy."

(R 54-55)

On Friday, January 10, 1969, further proceedings were conducted by the trial court (R 60-123), at the conclusion of which the court stated:

"THE COURT: Mr. Muir, the Court herein finds you in judicial and willful contempt and I cite from Chapter 49, 'for service processed by publication'.

"The divorce has been set aside and has not been complied with. The affidavit signed on May 10, 1968 asserting the diligent search and inquiry has not been complied with according to the testimony given today.

"The testimony given at the hearing on the divorce and the testimony given in prior hearing of the contempt citation as a whole, after listening to the answers the Court does hereby find you to be in willful contempt.

"To indicate such willful contempt, the divorce entered and the final judgment of divorce is set aside and nullified and shall have no force and effect as of the date of entry.

"Mr. Muir, I do hereby order and confine you to the Duval County Jail for a period of sixty days from the date herein.

"Draw the order." (R 121)

On January 10, 1969, during the proceedings, the plaintiff himself testified on the issue which the court resolved by its opinion of the evidence, as follows:

"* * * I never contacted her personally because I never knew where she was." (R 106)

"Q. Did she at any time tell you where Carol was?

"A. No." (R 107)

"A. She never contacted me once. There was one Father's Day card that could have been sent by anyone. It was addressed to me by a child's handwriting. It was post-dated Absecon, New Jersey.

"Q. Where is that in relation to Atlantic City?

"A. I'd say about ten miles. I can't be sure of that."
(R 107-108)

"Q. Why would you send the payments to your wife's mother?

"A. Because I did not know where my wife was."
(R 110)

"Q. Mr. Muir, when did you first realize that your wife was residing with her parents in the State of New Jersey?

"A. When this message came to the personnel with Congressional Express. It was from the Naval Cleveland Finance Center. It gave her address on that."
(R 110)

"Q. All right. Now, you did contact her mother in terms of time immediately prior to the filing of this suit?

"A. Yes, sir.

"Q. What did you ask her mother?

"A. I asked her for Mary Carol's address and her employer's name."
(R 119)

On January 10, 1969, the order appealed from was entered (R 124).

Ten days later, on January 20, 1969, plaintiff filed a motion pursuant to Rule 1.530, RCP, requesting a rehearing or new trial (R 126-128), which was denied on March 11, 1969 (R 160).

During the proceedings terminating in the denial, on March 11, 1969, of plaintiff's motion, the court stated:

"THE COURT: The Court will concede there was no admission by him."
(R 133)

The trial court specifically states:

"THE COURT: I have agreed with you technically, he has made no false statements."
(R 146)

The court concluded:

"THE COURT: This matter has bothered the Court a great deal. It bothered the Court that this Court had

to enter an order originally because we had a man with 18 years continuous service in the United States Navy, first class, and the Court was cognizant of the damage which could follow from it's order of January the 10th; but, taking the record as the whole and all the testimony before the Court, the Court is of the opinion now as it was then that it was direct contempt of the Court; that the integrity of this Court is paramount to anything of a consequence that may flow from this Court's action to this plaintiff.

"The Court, in the Court's opinion, gave the man ample opportunity to purge himself of that contempt, and failing to do that, therefore, your motion is denied, Mr. Glickstein." (R 155)

## Points Involved

### Point 1.

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT A CONVICTION FOR (CRIMINAL) DIRECT CONTEMPT.
(Raised by Assignments of Error Nos. 6 and 7)

### Point 2.

THE JUDGE FAILED TO COMPLY WITH PART XVI, FLORIDA RULES OF CRIMINAL PROCEDURE.
(Raised by Assignments of Error Nos. 5 and 7)

### Point 3.

THE POST JUDGMENT PROCEEDINGS, CONVICTION AND THE ORDER OF COMMITMENT OF

SIXTY DAYS IN THE DUVAL COUNTY COUNTY JAIL FOR DIRECT CONTEMPT CONTRAVENE PLAINTIFF'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND §1 OF THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND §§2, 9 AND 16, DECLARATION OF RIGHTS, §3 OF ARTICLE II, AND §3 OF ARTICLE V, CONSTITUTION OF FLORIDA OF 1968.

(Raised by Assignments of Error Nos. 1, 2, 3, 4, 5, 6 and 7)

## ARGUMENT

### Point 1.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION FOR (CRIMINAL) DIRECT CONTEMPT.

(Raised by Assignments of Error Nos. 6 and 7)

The aforementioned Assignments of Error are as follows:

> "6. The court erred in entering the Order dated January 10, 1969.
>
> "7. The court erred in entering its order dated March 11, 1969, denying plaintiff's Rule 1.530 Motion." (R 163-164)

The circuit judge imposed punishment upon plaintiff because of his opinion (R 155) that a direct criminal contempt had occurred. The basis for the opinion is a belief that plaintiff's testimony at the final hearing and thereafter was *untrue* (R 124). However, the Florida Supreme Court has established three elements as being essential in order that perjury or false swearing may constitute contempt of court. They are:

> "[I]n order that perjury or false swearing may constitute contempt of court: '(1) the alleged false answers had an obstructive effect, (2) there existed

judicial knowledge of the falsity of the testimony, and (3) the question was pertinent to the issue." State ex rel. Luban v. Coleman, 1939, 138 Fla. 555, 189 So. 713; Mitchell v. Parrish, Fla. 1952, 58 So. 2d 683."

*State ex rel. Laramie v. Boggs*, 151 So.2d 456, 458

The judge below neither found nor were there in existence either of those three essential elements. In fact, the judge conceded quite to the contrary:

"THE COURT: I have agreed with you technically, *he has made no false statements.*" (emphasis added)

(R 146)

The second essential element dealing with judicial knowledge cannot be predicated solely on the court's opinion that the witness is lying. 17 Am. Jur. 2d, Contempt, § 33, p. 38; *Ex parte Hudgings*, 249 U.S. 378, 63 L. Ed. 656, 39 S. Ct. 337, 11 ALR 333.

Even had the judge not conceded the issue as he did, the lower court could not judicially know that the testimony was false without the taking of collateral testimony to establish the falsity, *Washington v. Estill*, 55 Wash. 2d 576, 349 P. 2d 210, 89 ALR 2d 1251; consequently, there is no evidence whatsoever to support the order.

The complete absence of any evidence of the comission of the offense precludes plaintiff's conviction. *Johnson v. Florida*, 391 U.S. 596, 88 S. Ct. 1713, 20 L. Ed. 2d 838; *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654; *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248; 7 L.Ed.2d 207; *Taylor v. Louisiana*, 370 U.S. 154, 82 S.Ct. 1188, 8 L.Ed.2d 395.

**Point 2.**

THE JUDGE FAILED TO COMPLY WITH PART XVI, FLORIDA RULES OF CRIMINAL PROCEDURE.

(Raised by Assignments of Error Nos. 5 and 7)

The aforementioned Assignments of Error are as follows:

> "5. The court erred in conducting the proceedings on January 10, 1969.
>
> "7. The court erred in entering its order dated March 11, 1969, denying plaintiff's Rule 1.530 Motion." (R 163-164)

Rule 1.830, Florida Rule of Criminal Procedure, states:

> "A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court."

There was obviously no attempt at compliance or concern with the rule.

While plaintiff does not contend that there was necessarily any "summary" action, since several hearings did in fact occur, it is contended that merely because there were several appearances separated by elements of time, nonetheless the court attempted to punish summarily conduct which in its opinion constituted a contempt committed in the actual presence of the court. There was no judgment of guilt reciting facts upon which an adjudication was based. Frequently the court refused to permit plaintiff the opportunity of presenting evidence. The rule regarding direct criminal contempt was simply not followed.

In passing, it should be noted that although no attempt was made at compliance with Rule 1.840, Florida Rules of Criminal Procedure, since there could be no indirect criminal contempt, that rule is not applicable.

**Point 3.**

THE POST JUDGMENT PROCEEDINGS, CONVICTION AND THE ORDER OF COMMITMENT OF SIXTY DAYS IN THE DUVAL COUNTY JAIL FOR DIRECT CONTEMPT CONTRAVENE PLAINTIFF'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND §1 OF THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND §§2, 9 AND 16, DECLARATION OF RIGHTS, §3 OF ARTICLE II, AND §3 OF ARTICLE V, CONSTITUTION OF FLORIDA OF 1968.

(Raised by Assignments of Error Nos. 1, 2, 3, 4, 5, 6 and 7)

The aforementioned Assignments of Error are as follows:

"1. The court erred in entering the 'Order for Citation' dated November 27, 1968.

"2. The court erred in issuing the 'Citation' dated November 27, 1968.

"3. The court erred in entering the Order dated December 4, 1968.

"4. The court erred in conducting the proceedings on December 4, 1968.

"5. The court erred in conducting the proceedings on January 10, 1969.

"6. The court erred in entering the Order dated January 10, 1969.

"7. The court erred in entering its order dated March 11, 1969, denying plaintiff's Rule 1.530 Motion." (R 163-164)

The civil proceedings had terminated with the entry of the final judgment of divorce. Upon the expiration of the times provided by the rules for motions and appeals, the judgment became absolute and the lower court lost jurisdiction as to the parties. *Mid-State Homes, Inc. v. Ritchie*, 181 So.2d 725,727. It attempted to recall that jurisdiction by the entry of the order for citation and service of the citation upon the plaintiff. It thereby acted without, and in excess of, its jurisdiction. *State ex rel. S.A.L. Ry. Co. v. Kehoe*, 133 So.2d 459.

In addition, the order was based upon affidavits (R 14) which the court examined privately without any prior notice or opportunity to plaintiff. The proceedings conducted December 4, 1968 indicate the harmful effect of the use of one of the affidavits and the denial of an opportunity to be confronted by and cross-examine that witness. Those examples appear at R 41, 42, 44 and 51. In each such instance, the judge conducted his examination of the plaintiff by referring to matters in the affidavit of Alfred M. Adams, who never appeared in court. Those basic accusations lingered in the judge's mind throughout the proceedings: Thus, plaintiff was denied a fundamental right to confrontation of opposing witnesses. *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923.

A careful examination of the record of the proceedings also clearly establishes that plaintiff was never properly represented by competent counsel who told him that he was the object of prosecution in a criminal proceeding of any kind; never advised of any rights, including the right not to testify and to be represented by *competent* counsel. Additional comment in this area is unnecessary, as it is plain from the record. See also *A Sick Profession*, 27 Fed. B. J. 228 (1967) by Judge Warren E. Burger (confirmed June 9, 1969 as the new Chief Justice of the United States).

The judge failed to heed the requirement of §3, Article II, of the new Constitution, providing for the prohibition of the judiciary from exercising the powers of any other branch. In practical effect, the additional role of prosecutor was assumed by the judge.

Article V, §3, Constitution of the State of Florida, further provides that the rules adopted by the Supreme Court shall govern the practice and procedure in all courts. From the record, it is not possible to ascertain with any degree of certainty that any promulgated rule of procedure was followed.

In his order the judge said:

> "* * * [T]he Court does hereby find that the testimony given before the Court at the final hearing for divorce on September 18, 1968 together with the testimony given before the Court on December 4, 1968 and testimony heard this date by the Court, taken as a whole, the Court finds that said testimony constitutes the Plaintiff, Albert B. Muir, III, to be in willfull, open and direct contempt of this Court. Upon consideration, it is therefore
>
> "ORDERED that the Plaintiff, Albert B. Muir, III, shall be taken into custody by the Sheriff of Duval County, Florida, and placed in the Duval County jail and there to be kept for 60 days for such willfull, open and direct contempt." (R 124)

The record thus closes as it began; neither a clear statement of essential facts constituting the offense charged, nor any evidentiary findings to support the judgment.

## CONCLUSION

It was error to convict plaintiff of direct contempt. The judgment should be reversed.

Respectfully submitted,

Joseph M. Glickstein, Jr.
1205 Universal Marion Building
Jacksonville, Florida
Attorney for Appellant

## CERTIFICATE OF SERVICE OF COPY

I DO CERTIFY that a copy hereof has been furnished Honorable Earl Faircloth, Attorney General, Tallahassee, Florida; David U. Tumin, Esquire, Assistant Counsel, City of Jacksonville, City Hall, Jacksonville, Florida; and Messrs. Joseph F. Duszlak and Gunnar Miller, Duval County Legal Aid Association, 405 Guaranty Life Building, Jacksonville, Florida, by U. S. Mail, this _____ day of June, 1969.

_____

Attorney

## APPENDIX

### COMPLAINT FOR DIVORCE

[Filed May 13, 1968]

* * * *

5. That the Defendant left the Plaintiff in 1961 and was gone for a period of over one year and returned and the Plaintiff and the Defendant resumed their relationships as husband and wife until April 11, 1967 at which the Defendant left the Plaintiff for parts unknown.

6. That there is a home located at Box 115, Hibernia Road, Green Coves Springs, Florida which the Plaintiff requests the Court to award to him in addition to the 1967 Plymouth Belvedere Tudor Sedan.

7. Plaintiff charges that the Defendant is guilty of willful, obstinate, and continuous DESERTION of the Plaintiff for a period of more than one (1) year-to-wit, since April 11, 1967.

* * * * * * * * * * *

### AFFIDAVIT FOR CONSTRUCTIVE SERVICE

[Filed May 13, 1968]

STATE OF FLORIDA )

: SS

COUNTY OF DUVAL )

I certify that on this day, before me, a Notary Public duly authorized to administer oaths in the State and County named above personally appeared ALBERT B. MUIR, III and stated under oath that he is the Plaintiff in the above entitled cause; that he has made diligent search and inquiry (the details of which will be testified to at the final hearing) to discover the name and residence of the Defendant in the above entitled cause, MARY CAROL MUIR, and the same are set forth in this sworn statement as particularly as is known to him; that the

Defendant is over the age of 21 years, and the residence of the Defendant is: UNKNOWN TO THE PLAINTIFF.

/s/ Albert B. Muir, III
ALBERT B. MUIR, III

WITNESS MY HAND AND OFFICIAL SEAL in the County and State named above this 10th day of May, A. D. 1968.

/s/ J. D. Culpepper, Jr.
Notary Public, in and for the State of Florida at Large. My Commission expires March 30, 1972

* * * * * * * * * * *

**CERTIFICATE OF SERVICE AND MOTION FOR DEFAULT JUDGMENT OF DIVORCE**

[Filed Aug. 30, 1968]

COMES NOW the Plaintiff by his undersigned attorney and shows unto the Court as follows:

1. That publication was duly and regularly made but the Defendant has failed to answer or otherwise plead within the time allowed by law.

2. That neither pleadings or copies thereof have been served on Plaintiff or his attorney.

WHEREFORE the undersigned moves this Honorable Court to enter a Final Judgment of Divorce against the Defendant; the Complaint be taken as confessed and this cause proceed ex parte.

* * * * * * * * * * *

## AFFIDAVIDIT OF NON-MILITARY SERVICE

[Filed Aug. 30, 1968]

STATE OF FLORIDA )
: SS
COUNTY OF DUVAL )

Before me this day personally appeared the undersigned, who being first duly sworn, deposes and says:

That he is a licensed attorney and of counsel for the Plaintiff in the above entitled action; and that from the information furnished, said Defendant Mary Carol Muir, is not now in the military service of the United States as is evidenced by letters from various branches of the Military Service by copies of said letters attached hereto as exhibits A, B, C, D and E, nor has she been in such service during the pendency of this action or for more than ninety (90) days prior to the institution of this action; that the Defendant, Mary Carol Muir's present whereabouts, is unknown.

## APPENDIX 2

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

ALBERT B. MUIR, III,

Appellant,

vs. NO. L-365

MARY CAROL MUIR,

Appellee.

APPEAL FROM THE
CIRCUIT COURT OF DUVAL COUNTY

REPLY BRIEF FOR APPELLANT

Joseph M. Glickstein, Jr.
*Attorney for Appellant*

Glickstein, Crenshaw, Glickstein, Hulsey & Fay
1205 Universal Marion Building
Jacksonville, Florida 32202

Of Counsel.

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

ALBERT B. MUIR, III,

Appellant,

vs. NO. L-365

MARY CAROL MUIR,

Appellee.

## REPLY BRIEF FOR APPELLANT

Several factual conclusions drawn by the Attorney General in his brief need close examination and comparison with the record on appeal. In addition, certain propositions of law advanced by him require reply and further discussion.

## ARGUMENT

### Point 1.

On page 4 of his brief, the Attorney General quotes the specific statement of the trial court. He emphasizes what he calls "findings" and concludes that those words formed the basis for a finding of direct criminal contempt. If that language employed by the trial court could be considered "*** a recital of those facts upon which the adjudication of guilt is based. ***" (Rule 1.830, CrPR), we are first directed to plaintiff's affidavit for constructive service and then to his testimony taken on September 18, 1968.

Since the affidavit itself was actually signed and sworn to by plaintiff three days prior to the filing of the law suit, plaintiff was not before the trial court. *State v. Boggs*, 151 So.2d 456, 459. Consequently, in the absence of an actual admission to the court that the affidavit contained false material facts, the element of judicial knowledge was lacking and no direct criminal contempt could flow therefrom.

At pages 5 and 6, the Attorney General claims the existence of facts which do not appear in the record. As examples, (1) there is nothing in the record which in any way indicates an attempt to lead the trial court to believe that plaintiff "had not an inkling of knowledge as to where his wife was situated"; (2) the record contradicts the assertion by the Attorney General at page 5, that plaintiff "knew that his wife left him in April of 1967 to go with her father" (R 41, 42); and (3) plaintiff made no such admission as described on page 6. Then, the Attorney General concedes that "even if he did not know the exact street address of his wife the wife's parents obviously did". What knowledge was possessed by the parents is immaterial. However, the record does not support even this statement.

At page 6, the Attorney General argues that "Appellant admitted at the hearing of January 10, 1969 that he made no diligent search prior to swearing to the same by affidavit (R 120)." However, reading the record, pages 118-120, in context, the inescapable conclusion is that the "diligent search" was made between the time plaintiff's wife left and the time plaintiff contacted Mr. Culpepper. The affidavit specifically referred to that "diligent search". Consequently, it is entirely untenable that any admission ever occurred where the trial court could judicially know, without collateral testimony, of the existence of any falsity as regards the affidavit. Appellant never made the admission asserted by the Attorney General (R 119, 120).

We are therefore left with only the testimony taken on September 18, 1968 for further consideration. The entire

examination conducted by the trial court itself is set forth in the record at pages 7 through 10. Nowhere is there any answer given by plaintiff that is false. While plaintiff's answers may be both evasive and unresponsive to the court's questions, nevertheless the court was apparently satisfied with those answers at the time and proceeded to adjudicate that the testimony was sufficient for jurisdictional purposes.

To further illuminate the impossibility of the occurrence of a direct contempt at the time designated, the trial court found it necessary to refer to matters occurring subsequent to September 18, 1968; specifically, affidavits, testimony given December 4, 1968, and testimony given January 10, 1969 (R 124) (Brief for Appellant, p. 16).

The Attorney General quietly sidesteps the concessions of the trial court (R 133, 146) (page 9, Brief for Appellant). Since there was neither admission by appellant nor any false statements in the testimony of September 18, 1968, the court was powerless to convict for the offense of direct criminal contempt. Both *Mitchell v. Parrish*, 58 So.2d 683, and *Washington v. Estill*, 55 Wash.2d 576, 349 P.2d 210, 89 ALR 2d 1251, contain an excellent discussion dealing with this specific point.

Florida adheres to the position that in order to constitute contempt, perjury or false swearing must relate to a material matter. Mitchell v. Parrish, *supra*. Since the alleged perjury must relate to a material matter, the elements of perjury must be established. Justice Thornal, in the case of *Gordon v. State of Florida*, 104 So.2d 524, 530, in discussing the definition and elements of perjury, says:

> "The crime of perjury committed in a judicial proceeding is condemned by Section 837.02, Florida Statutes, F.S.A. * * * . The crimes are not clearly defined by the statutes. We, therefore, look to cases and the common law for definitions. In Wharton's Criminal Law and Procedure, Vol. 3, Sec. 1290, we find the following:

"'At common law perjury was (1) the wilful (2) giving of false testimony (3) on a material point (4) in a judicial proceeding, (5) by a person to whom a lawful oath had been administered.'

"See also Clark and Marshall, Crimes (5th ed.), p. 641, Sec. 446(a). The foregoing are the basic essentials in Florida. Miller v. State, 15 Fla. 577. * * * ."

The Attorney General also argues that plaintiff's testimony had an obstructive effect, although he refers to no facts or matters in the record in support of such a position.

**Point 2.**

The Attorney General infers that rules of procedure dealing with convicting a person for a direct criminal contempt may be disregarded, since they have "nothing to do with promoting the issue of the case". However, the rule is a limit on the court's authority to punish summarily. It requires that "* * * the court saw or heard the conduct constituting the contempt committed in the actual presence of the court * * *". Contrary to the assertion at page 8 of the Attorney General's brief, there was no finding of fact as contemplated by the rule. The "Order for Citation" (R 14) and the "Citation" (R 32) clearly establish that the affidavits furnished the court by defendant and her father were relied upon as proof of the offense. Yet, no further reference is made to those facts by the court. The "Order" (R 12) merely recites a finding of contempt.

Direct criminal contempt is a serious offense. There is no limit in Florida upon the punishment which may be inflicted upon an adjudication of guilt. The Supreme Court thought it of sufficient importance to create Part VI of the Rules of Criminal Procedure. Why then should not the trial court be required to follow the rule? Contrary to historical views, criminal contempt is in fact a crime. *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522.

## Appellee's Point 3.

Plaintiff does here strenuously contest the jurisdiction of the trial court as to the contempt proceeding and did before that court question its jurisdiction. That this court has previously resolved a jurisdictional issue regarding a civil action has no bearing on the different issue involved in this case. cf. *Lockhart v. Dade County*, 157 Fla. 281, 25 So.2d 646. The issue here is whether a court of general jurisdiction can initiate, by a citation, a criminal contempt proceeding in a manner not contemplated by the Rules of Criminal Procedure or otherwise. Proceedings for criminal contempt are between the public and the defendant, and are not a part of the original cause. *Seaboard Airline Ry. Co. v. Tampa Southern R. Co.*, 101 Fla. 468, 134 So. 529, 532; *In Re Brevard County Grand Jury*, 206 So.2d 398.

If a *direct* criminal contempt were actually committed there would have been no need for the "Citation" or the subsequent proceedings. The use of such proceedings by the trial judge clearly indicates lack of the commission of an offense in the presence of the court. In order to obtain jurisdiction over plaintiff then, either of two methods were available. One was by Information (Rule 1.140, CrPR) filed in the Criminal Court of Record, or the other, utilization of Rule 1.840, CrPR. Neither procedure was followed. Thus, no jurisdiction was acquired.

Plaintiff would also call to the attention of the court its opinion in *Kirby v. Speight*, 217 So.2d 871.

## Appellee's Point 4.

While the argument of the Attorney General on his point 4 is indeed interesting, it finds no support in the law.

He suggests that an "ex parte affidavit" should be an acceptable substitute as a prosecution exhibit in a criminal case because deponent may be "hundreds of miles away in another state". This position is not only incredible, but flowing from the pen of the Attorney General is startling.

No facts were disclosed to plaintiff in the "Citation" served upon him. He was informed that "[t]he court file contains the evidence * * *." He was not told where or when or in what manner he swore falsely. He was allowed seven days (November 27, 1968 to December 4, 1968) to prepare his defense to a criminal charge. He was told that the charge was "* * * based on information presented to * * *," the trial judge.

The Attorney General argues that prosecution for criminal contempt is a non-criminal process and accordingly fundamental rights and procedural safeguards do not apply. However, in opinions to the contrary Mr. Justice White, in Bloom v. Illinois, *supra*, stated:

> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:
>
> " 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.' Gompers v. United States, 223 U.S. 604, 610, 34 S.Ct. 693, 695, 58 L.Ed. 1115 (1914).
>
> Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates."

and Mr. Justice Stewart, in *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, said:

> "In Pointer v. State of Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923, this Court held

that the Sixth Amendment right of an accused to confront the witnesses against him is a 'fundamental right * * * made obligatory on the States by the Fourteenth Amendment.' * * *

"As the Court said in Pointer, 'It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.' 380 U.S., at 404, 85 S.Ct., at 1068. Even more recently we have repeated that '[A] denial of cross-examination without waiver * * * would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314."

**Appellee's Point 5.**

We shall demonstrate from the Record-on-Appeal that plaintiff was not properly represented by competent counsel.

"THE COURT: Mr. Culpepper, have you informed your client of the State of Florida regarding perjury?

"MR. CULPEPPER: Yes, sir.

"THE COURT: Have you informed him this is a crime punishable by twenty years in Florida's State Prison, Raiford?

"MR. CULPEPPER: Yes, sir, we're aware of that."

Plaintiff is in court under criminal process; He is in custody. The only warning given was the two statements quoted above. Neither the court nor Culpepper, ever, during any proceedings which followed, advised plaintiff of his right to remain silent; of his right to a reasonable time to prepare a defense; or his right to counsel. Other than the court's reference to perjury (R 37) and bigamy (R55) plaintiff is never told that he is being prosecuted for a crime.

During the December 4, 1968 interrogation of plaintiff by

the court, the affidavit of the non-appearing witness was used without objection by Culpepper. As a matter of fact, Culpepper was a co-defendant (R 14).

"MR. CULPEPPER: Your Honor, this doesn't correspond to the writing of Mr. Muir. I don't know who could have, but—

"THE COURT: She's identified it as his printing.

"MR. CULPEPPER: I know he's identified it as his printing and I haven't had a chance to identify it.

"THE COURT: No objection?.

"MR. CULPEPPER: No objection." (R 72)

Clearly incompetent evidence—"no objection".

"Q. Mrs. Muir, I also hand you another brief note and ask that you identify that note, please.

"A. Yes. It's a short note from my husband which is dated March 1st.

"MR. CULPEPPER: To whom?

"A. It doesn't say to whom, but it was in an envelope with a seventy dollar payment for support of the child.

"It says here, (Reading) 'Please don't cash this until March 1st or later. I need to know Mary Carol's employment status during 1967 and how she intends to file her income tax return. Abe.'

"MR. DUSZLAK: I'd like to admit this into evidence as number Six.

"THE COURT: Any objection?

"MR. CULPEPPER: None." (R 75)

"MR. CULPEPPER: I would like to introduce these envelopes, Your Honor, into evidence.

"THE COURT: When it comes your turn to put your case on, your're at perfect liberty to do so, sir.

"MR. CULPEPPER: I'm getting ahead of myself."

(R 81-82)

"MR. CULPEPPER; Your Honor, I'd like to—

"THE COURT: Would you mind holding it until you

put your case on? You're on cross examination.

"MR. CULPEPPER: I know that." (R 83-84)

"THE COURT: Mr. Culpepper, don't start arguing with each other.

"MR. CULPEPPER: I'm not arguing.

"THE COURT: Yes you are.

"MR. CULPEPPER: You know me. I don't argue."

(R 87-88)

"MR. CULPEPPER: Your Honor, you got me a little bit thrown here for a minute.

"THE COURT: I'm sorry. I didn't mean to. Do you want to take a break?

"MR. CULPEPPER: I'd like to go ahead and get this over with, Your Honor.

"THE COURT: All right. Go right ahead." (R 98-99)

Both plaintiff and his lawyer were cited to appear before the court (R 14, 15). From a reading of the three transcripts the conclusion is inescapable that Mr. Culpepper was deficient by reason of poor preparation, inability to frame questions properly, lack of ability in the handling and presentation of documents and letters, lack of ability to frame objections adequately, lack of basic analytic ability in understanding the issue and lack of ability in recognizing an objectionable question or exhibit.

The "Citation" served on plaintiff by the Sheriff of Duval County, on November 27, 1968, was a criminal process of no less dignity than an arrest warrant issued by a justice of the peace or a capias issued by a court of record. When plaintiff and his attorney appeared in response thereto, they were as much under arrest and in custody, if not more so, than any defendant arrested by a police officer by other lawful process. Since Mr. Chief Justice Warren's landmark opinion in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, there is little room for doubt that a "custodial interrogation" occurs whenever a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way*. It is beyond

contention that the arrest and appearance by plaintiff in response to the citation led to a "custodial interrogation". In the language of the citation the court stated: "THIS IS THEREFORE TO COMMAND YOU to answer said charges personally by appearing ***" on December 4, 1968 at 11:15 A.M. in Room 202, Duval County Courthouse (R 32). Yet, nowhere in the record, at either the hearing on December 4, 1968 or its continuance on January 10, 1969, is it established that plaintiff or his attorney were ever advised of their right to remain silent and their continuous opportunity to exercise it. Since such warning is nowhere evident there can be no waiver of such right. The proceeding held December 4, 1968 and January 10, 1969, and all orders and judgments resulting therefrom, violated plaintiff's constitutional rights as alleged in paragraph 7 of the Rule 1.530 Motion filed by plaintiff on January 20, 1969 (R 126, 127). If, for no reason other than this constitutional one, the order appealed should be reversed and the case remanded to the trial judge with instructions to proceed with further hearings and to exclude all prior evidence taken from plaintiff in contravention of his aforesaid rights.

Consideration must be given to the real nature of the proceeding against plaintiff initiated by the trial court. In effect, plaintiff was informed by the citation (R 32) that the court had determined his probable guilt as to the commission of an offense and that the burden was upon him to show cause why he should not be held in contempt. It cannot be questioned that the quality of the evidence, without the testimony of the plaintiff, would not have been sufficient to convict. Consequently, the failure to inform plaintiff of his right to remain silent constituted an extremely harmful prejudicial error. The proceedings partook of an examination similar to a preliminary examination on a warrant based upon some form of probable cause. In *State v. Galasso*, 217 So.2d 326, 329, the court recognized the impact of *Miranda*.

While the natural tendency to counter plaintiff's argument on this point is to pass it off by saying the court conducted the

examination in other than a "police dominated atmosphere", the fallacy is self-evident. The trial court assumed the role of the law enforcement agency by initiating the prosecution, causing the arrest of plaintiff, and thereafter conducting the examination without adequate warnings. *Stassi v. United States*, 401 F.2d 259, 263. On December 4, 1968, the court inquired merely as to whether Culpepper had informed plaintiff as regards perjury (R 37) and on January 10, 1969 as to whether the charges had been explained to him. Consequently, plaintiff's fundamental right to remain silent was entirely disregarded. As Chief Justice Warren said in Miranda v. Arizona, *supra*:

> "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." p. 1630

In addition, the issuance of the citation itself, based on the affidavits, contravenes the rule announced by the Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, thereby infringing upon plaintiff's Fourth Amendment rights.

**Appellee's Point 6.**

The argument here, that in a true contempt proceeding the trial judge acts on his own view, of his own knowledge, illuminates the untenable position advocated by the Attorney General. In the present proceeding the trial court did not act on his own view, of his own knowledge, but relied upon affidavits as the basis of initiating, *sua sponte*, all proceedings involved. While Rule 1.840, CrPR, did originally provide for a jury trial, it was later amended to remove the requirement. Bloom v. Illinois, *supra*, could eventually result in the rule being held to be unconstitutional. In this respect, if applicable to plaintiff's case, the rule is thus challenged.

By not utilizing any known rule of procedure and in assuming the role it did, the trial court did violate the Doctrine of Separation of Powers.

## CONCLUSION

For the foregoing reasons, it is submitted that reversible error was committed and the order should be reversed.

Respectfully submitted,

/s/ Joseph M. Glickstein, Jr.
Joseph M. Glickstein, Jr.
1205 Universal Marion Building
Jacksonville, Florida
Attorney for Appellant

## CERTIFICATE OF SERVICE OF COPY

I DO CERTIFY that a copy hereof has been furnished Honorable Earl Faircloth, Attorney General, and Honorable James Robert Yon, Assistant Attorney General, Counsel for Appellee, Capitol Building, Tallahassee, Florida, by U. S. Mail, this 22nd day of August, 1969.

/s/ Joseph M. Glickstein, Jr.
Attorney